No. 01-76

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

HAHN AUTOMOTIVE CORPORATION,
doing business as Autoworks, Inc.,

Petitioner,

-against-

KENNETH A . TAKACS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The *amicus curiae* City of New York, respectfully submits this brief in support of the petition for certiorari.

STATEMENT OF INTEREST

The *amicus curiae* City of New York ("the City") has six actions pending against it in the United States District Court, Southern District of New York, brought by over five thousand highly-paid employees who have been classified as exempt from the overtime compensation requirements of the Fair Labor Standards Act ("the FLSA") as "bona fide, executive, administrative, or professional" employees, pursuant to 29 U.S.C. §213(a)(1). This exemption is commonly referred to as "the white collar exemption." The employees in these six actions collectively seek tens of millions of dollars in overtime compensation, plus liquidated (double) damages, even though these employees willingly accepted their positions either pursuant to employment agreements that provided that the employees would receive no overtime compensation, or pursuant to collective bargaining agreements that established the parameters of their eligibility for overtime compensation.

The United States Department of Labor ("DOL") has promulgated regulations for the white collar exemption, which include provisions that exempt employees be paid on a "salary basis." 29 C.F.R. §541.118(a). In all six cases pending against the City, the only remaining claim concerns one provision of the salary basis regulation, the disciplinary deduction provision. 29 C.F.R. § 541.118(a)(5). This provision has been construed to generally preclude deductions from salary as a disciplinary penalty for exempt employees. There is no dispute that consistent with the DOL regulations, the City's employees perform the duties of exempt employees and receive salaries far in excess of those required.

Based on the frequent decisions that continue to be issued by federal courts across the country, many other

employers, in both the public and private sectors, also face massive or substantial liability, in the form of windfall awards to groups of highly-paid employees, in cases concerning the disciplinary deduction provision of the salary basis regulation. An example of the scope of the potential liability is demonstrated by just one of the City's cases, in which damages were in excess of $13.3 million, exclusive of attorneys' fees and costs. This award covered 430 plaintiffs and a four-and-one-half year liability period, which ended in 1993. However, the windfall was not evenly distributed; the employees with the highest annual salaries generally obtained the largest awards (which are then doubled through statutory liquidated damages). Approximately one hundred employees had awards between $10,000 and $50,000, approximately fifty-five employees had awards between $50,000 and $100,000, approximately thirty-five employees had awards between $100,000 and $200,000, and five employees had awards exceeding $200,000.

Whether the City will be required to pay these windfall awards is still unsettled. In its most recent opinion in that case, Yourman v. Giuliani, 229 F.3d 124, 129 (2d Cir. 2000), cert. denied, 121 S. Ct. 1362 (2001)(prior history omitted), the Second Circuit upheld the finding that the City did not have policies that created a significant likelihood of deductions, However, the Court of Appeals found that in determining whether there was a practice of deductions, the District Court, inter alia, had improperly simply divided the number of deductions by the number of managerial employees, quoting with disapproval the District Court's statement that "out of 3,708 ... managers, four deductions constitute only 0.1%. This is not sufficient to constitute a practice of deductions." Id. at 130. The Second Circuit vacated the grant of summary judgment to defendants and remanded the case to the District Court for further fact-finding on the practice issue. Id. at 130-131. Thus, there is again a possibility that the City may face massive liability, and that the highly-paid plaintiff-

employees, almost all of whom never experienced any deductions in their pay, may obtain massive windfall awards.

The City's six cases were commenced in the early 1990's. Since then, there has been continuing confusion, and changing standards in the controlling law. As a result, judgments or dispositive orders in all six cases have been actually or effectively vacated, including vacatur of a judgment by the Court, Yourman v. Giuliani, 519 U.S. 1145 (1997).

In all six of its cases, the City has invoked the window of correction provision of the salary basis test, 29 C.F.R. §541.118(a)(6), which is the subject of this appeal. This provision allows an employer to retain the exemption by reimbursing employees whose pay has been deducted in a manner inconsistent with the salary basis regulation and by promising to comply with the regulation in the future. The window of correction provision serves the important purpose of requiring both retroactive and prospective compliance with the salary basis test, while avoiding windfall awards to employees and massive liability for employers.

In Yourman, 229 F.3d at 128, the Second Circuit, relied, inter alia, on a DOL amicus brief in finding that the window of correction provision was not available to an employer who had a policy or practice of docking salary for disciplinary reasons. DOL propounded the same restrictive interpretation in amicus briefs submitted to the Sixth Circuit in Takacs v. Hahn Automotive Corp., 246 F.3d 776, 783 (6th Cir. 2001), and to two other circuit courts, which also adopted DOL's restrictive interpretation.

By contrast, other circuit court decisions, which relied on the plain language of the provision, and since 1997, on the Court's reading of the provision in Auer v. Robbins, 519 U.S. 452 (1997), found that the window of correction

is available if the deductions were not made for lack of work. The amicus City of New York asks that the Court grant certiorari to authoritatively resolve the issue of the proper interpretation of the window of correction provision.

SUMMARY OF ARGUMENT

The recent restrictive judicial interpretations of the window of correction provision are primarily based on DOL's interpretation, as submitted to these courts in amicus briefs. However, DOL's recent restrictive interpretation of the window of correction provision is inconsistent with: 1) the plain, unambiguous language of the provision; 2) the Court's reading of the provision in Auer, and 3) DOL's own prior interpretation of the provision. DOL's restrictive interpretation is entitled to no deference in these circumstances, and should be rejected.

REASONS FOR GRANTING THE WRIT

I. The Petition Should be Granted so that the Court May Decide Whether the Window of Correction Provision Should Be Construed in Accordance with its Plain Language and with the Court's Construction of the Provision in Auer v. Robbins

The window of correction provision of the salary basis test, 29 C.F.R. §541.118(a)(6), states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for

> reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

In Auer v. Robbins, 519 U.S. 452 (1997), the Court interpreted the window of correction provision in accordance with its plain language. The question was whether the window of correction could be used to preserve the exemption by reimbursing an employee whose pay had been intentionally docked as a disciplinary penalty. The employees contended that the window of correction was unavailable because the deduction was not inadvertent. The Court rejected this argument, relying on "the plain language of the regulation [which] sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Id. at 463.

In Takacs, 246 F.3d at 782, the Sixth Circuit concluded that the window was not available if there was a policy or practice of disciplinary pay docking. In reaching this conclusion, the Sixth Circuit relied on a DOL opinion submitted in an amicus brief. Contrary to the DOL opinion, the reasoning in Auer indicates that the window of correction is available in these circumstances. The plain language construed in Auer, as permitting corrective action when a deduction is either inadvertent or made for reasons other than lack of work, is in the fourth sentence of the provision. The sentence begins "On the other hand...." and then goes on to describe the deductions that may be corrected. The plain meaning of this introductory phrase is to contrast what follows the phrase (deductions that may be corrected) with what precedes the phrase (deductions that may not be corrected). The deductions that may not be corrected are described in the second and third sentences of the provision: "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a

case the exemption would not be applicable to him during the entire period when such deductions were being made." Thus, the plain language of the regulation provides that a general practice of making deductions based on lack of work is *not* correctable, whereas deductions made for reasons other than lack of work are correctable.

Following Auer, several circuit courts issued decisions which relied on the Court's reading of the window of correction provision, in construing the provision as allowing the correction of disciplinary deductions, whether or not there was a policy or practice of deductions, since the deductions were made for reasons other than lack of work. In Paresi v. City of Portland, 182 F.3d 665 (9th Cir.), cert. denied, 528 U.S. 1133 (1999), the Ninth Circuit found that there was no policy or practice, but also rejected the employees' argument that the window is unavailable when there is a policy or practice of disciplinary deductions:

> ...the text of the regulation contains no such limitation. "The plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action." Auer v. Robbins, 519 U.S. 452, 463 [other citations omitted]. The deductions made and corrected by the City were made for disciplinary reasons, which are "reasons other than lack of work" and, thus are covered by the window of correction.

Id. at 668.

In DiGiore v. Ryan, 172 F.3d 454 (7th Cir. 1998), there were five instances of improper docking. The Seventh Circuit stated that, "[e]ven if these five incidents rose to the level of frequent and, thus, constituted an actual practice by the SOS officials, the officers would still be exempt from the FLSA because the SOS officials availed themselves of the regulatory 'window of correction.'" Id. at 464. In Davis v. City of Hollywood, 120 F.3d 1178, 1180 (11th

Cir. 1997), the Eleventh Circuit found that the window of correction was available to repay six employees who experienced disciplinary dockings, because the dockings were made for reasons other than lack of work.

In Balgowan v. New Jersey Department of Transportation, 115 F.3d 214 (3d Cir. 1997), the Third Circuit also found that Auer authorized broad use of the window of correction:

> As a final note, the Supreme Court in Auer stated that the salary test's "window of corrections," [sic] 29 C.F.R. §541.118(a)(6), is available to preserve the exempt status of employees who have been subjected to pay deductions inconsistent with the salary-basis test. The Court emphasized that the employer could reimburse employees not only if the deductions were 'inadvertent' but also if they were "made for reasons other than lack of work." *Auer, 117 S. Ct. at 912* (quoting 29 C.F.R. §541.118(a)(6)(alteration added)). Accordingly, if any DOT engineer's pay had been docked, the window of correction could have been used by the State to preserve that engineer's exempt status.

Id. at 219.

These post-Auer decisions are consistent with interpretations of the window in many of the pre-Auer decisions (although there was a split in the circuits on this issue prior to Auer)[1]. In International Association of Fire

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[1] Pre-Auer cases that held to the contrary were largely based on the conjunctive reading of the provision (requiring that deductions be inadvertent as well as made for reasons other than lack of work) that was rejected in Auer, 519 U.S. at 463. See, e.g., Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992);

Fighters v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D.Va., 1989), aff'd on opn. below, 912 F.2d 463 (4th Cir. 1990), there were twenty-six dockings pursuant to policies which permitted this practice. The Fourth Circuit held that the window of correction could be utilized to reimburse the employees since the City had also changed its policies and promised to comply in the future. In Lee v. Flightsafety Services Corp., 20 F.3d 428 (9th Cir. 1994), deductions were made *whenever* employees did not work their full weekly schedule. The Ninth Circuit held that the window could be utilized since the deductions were made for reasons other than lack of work. "The regulation is clearly written in the disjunctive, so either circumstance [inadvertence or other than lack of work] suffices." Id., at 433.

Similarly, in Kuchinskas v. Broward County, 840 F. Supp. 1548 (S.D. Fla., 1993), aff'd, 86 F.3d 1168 (11th Cir. 1996), cert. denied, 519 S. Ct. 1148 (1997), seventy-three out of 2,000 employees had impermissible salary dockings, and the lower courts held that the County employer could use the window of correction to maintain the exemption. The Court denied certiorari in Kuchinskas, on the same date that it vacated the judgments in several other cases, in light of Auer.

Contrary to these circuit court opinions, in Klem v. County of Santa Clara, 208 F.3d 1085, 1090 (9th Cir. 2000), DOL submitted an amicus brief in which it opined that the window of correction "is available only to employers that have demonstrated the 'objective intention' to pay their employees on a salaried basis," and that an employer that has a practice of making impermissible deductions, or a policy that effectively communicates that such deductions

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Spralding v. City of Tulsa, 95 F.3d 1492, 1503 (10th Cir. 1996), cert. denied, 519 U.S. 1149 (1997).

will be made, "necessarily has no intention of paying its employees on a 'salary basis.'" Id. at 1091. Klem also involved disciplinary deductions. For textual support, DOL focused on the second and third sentences of the provision: "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made." As summarized by the Ninth Circuit:

> In the Secretary's view, that passage establishes that an employer's intention to pay on a salaried basis is a prerequisite to its treating an employee as exempt. An employer's lack of intention to pay on a salaried basis may be shown by deductions when no work is available, as provided in the text of the rule, or by a practice of other impermissible deductions, as in this case.

Id.

However, as the Ninth Circuit noted, the passage relied on by DOL does not refer to any circumstance precluding use of the window of correction other than deductions generally made when no work is available. In Auer, the Court found that the plain language of the fourth sentence provides that deductions are correctable if they are made for reasons other than lack of work. DOL's interpretation of the second and third sentences is inconsistent with the plain language of the fourth sentence, as construed in Auer. If deductions made for reasons other than lack of work are correctable, pursuant to the fourth sentence, and the second and third sentences refer to deductions not being correctable when they are generally made for lack of work, then the plain language of the provision, when read in its entirety, provides that deductions are correctable, unless they are made for lack of work.

The Ninth Circuit strongly suggested that it did not find DOL's interpretation compelling, but was nevertheless deferring to DOL.

> Because of the high degree of deference owing to the Secretary's interpretation of her own rules, we need not conclude that her interpretation is the only reasonable construction of that rule, or even the best one. It merely must be sufficiently connected to the rule's text to be consistent with the rule. Id. at 1093.

In Klem, the Ninth Circuit also held that it was not bound by its own prior conclusion in Paresi, that the text of the regulation allows corrections whenever deductions are made for reasons other than lack of work, and that the window of correction may therefore be used when there is a practice or policy of deductions. Id. at 1094. Klem held that this conclusion in Paresi was dicta. Significantly, the Ninth Circuit also distinguished Paresi on the ground that Paresi was based on the text of the regulation, rather than on DOL's interpretation.

> The discussion in Paresi focused exclusively on the wording of the regulation and did not address the issue before us, which is whether the Secretary of Labor's interpretation should be given deference. The Secretary of Labor did not file an amicus brief in Paresi, and this court did not have before it a sufficient indication of what the Secretary's interpretation was. See *Paresi, 182 F.3d at 668, n.2.*

Id.

In the year following the decision in Klem, DOL has submitted amicus briefs concerning, inter alia, the window of correction issue, to three other circuit courts. In each instance, the circuit court has followed Klem, and deferred

to DOL's interpretation of the window of correction. Yourman, 229 F.3d at 128; Takacs, 246 F.3d at 781-84; Whetsel v. Network Proper Services, LLC, 246 F.3d 897 (7th Cir. 2001). (The Ninth Circuit also issued another decision following Klem. Block v. City of Los Angeles, 253 F.3d 410 (9th Cir. 2001).

Whetsel is similar to Klem in several noteworthy respects. First, to uphold DOL's interpretation, the Seventh Circuit had to overrule its own prior post-Auer precedent, DiGiore, 172 F.3d at 465. After deciding that DiGiore held that the window of correction was available to correct a practice of disciplinary deductions, the Seventh Circuit overruled that holding. Whetsel, 246 F.3d at 904. As a further indication of the degree to which its ruling was based on deference to DOL's opinion, the Seventh Circuit noted that DiGiore does not mention DOL's interpretation, "which suggests that the court might not have had that argument before it." Id. at 903. Whetsel also suggests that DOL's interpretation is not very persuasive.

> We emphasize that the question is not which interpretation of § 541.118(a)(6) is best or most natural, but only whether the Secretary's construction is reasonable. See *Pauley, 501 U.S. at 702; Klem, 208 F.3d at 1092-93.* While one may argue that the Secretary's interpretation is strained, it sufficiently comports with the language of the regulation so as not to be declared unreasonable or plainly erroneous.

Id. at 902-03.

Thus, the recent case law on the window of correction provision has been largely based on a DOL interpretation, which even some of the circuit courts that have deferred to DOL, have found less than compelling and probably not the best or most natural interpretation of the provision. However, the circuit courts have indicated that they believe

themselves required to give a high degree of deference to DOL's interpretation of its own regulation.

It is submitted that deference to DOL is not appropriate here. Courts are not required to give deference to an administrative agency's interpretation of its own regulation, if the interpretation is "plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted), Auer, 519 U.S. at 461. DOL's interpretation is inconsistent with the regulation for the reasons discussed above. In addition, the regulation explicitly states that the window is available even if more than one deduction has been made from a single employee: "the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." (emphasis supplied). Nevertheless, in its amicus briefs, DOL has taken the position that the window of correction is available for the correction of one-time or inadvertent deductions.

Further, courts are not required to defer to an agency's interpretation unless the regulation is ambiguous. Christensen v. Harris County, 529 U.S. 576, 588 (2000). In Auer, 519 U.S. at 463, the Court found that the window of correction provision's "plain language" allows correction of deductions made for reasons other than lack of work. This indicates that the language in the fourth sentence being construed in Auer was not ambiguous. Nor is ambiguity found in the language of the preceding (second and third) sentences of the regulation, which is consistent with the unambiguous language of the fourth sentence. As discussed above, the circuit courts that examined the regulation in light of the Auer opinion (apparently without consideration of DOL's opinion), concluded that the text of the regulation clearly and without qualification permitted correction of disciplinary deductions, since they were not deductions made for lack of work. This unambiguous language cannot be made ambiguous by DOL's reading terms into the regulation that are not contained therein.

II. DOL's Current Interpretation of the Window of Correction is Not Consistent with its Earlier Opinions concerning the Preservation of the Exemption and this is Another Reason why the Agency's Opinion is Not Entitled to Deference.

DOL's recent restrictive interpretation of the window of correction provision is also not entitled to deference, because it is not consistent with the agency's prior interpretations. General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

DOL's recent interpretation is that the window of correction is available for the correction of one-time or inadvertent deductions, and that if deductions are not one-time or inadvertent, the exemption is unavailable for *all* employees in the category, for the entire period during which such deductions were permitted. This is simply inconsistent with the interpretation found in prior DOL opinion letters. In a January 1986 opinion letter, DOL recognized that the exemption was preserved even though *multiple* deductions were made from the pay of a *single* employee, provided the deductions were occasional:

> Where an *occasional* deduction that is not permitted by section 541.118 is made *from the salary of an otherwise exempt employee*, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made. (emphasis supplied).

United States Department of Labor, Wage and Hour Opinion Letter (Jan. 15, 1986), available at Ginsburg, et al.,

Fair Labor Standards Handbook (1998), App. III, Administrative Rulings, 39.

Compare DOL's 1986 interpretation, that multiple "occasional" deductions from the pay of a single employee does not lead to the loss of the exemption (except in the weeks the employee is docked), with its present interpretation, that the window of correction is available when there is a "one-time deduction" in pay. DOL's current interpretation further provides that if the one-time deduction requirement is not satisfied, this indicates an intention not to pay employees on a salaried basis, and the consequences are that the window of correction is unavailable and also that the exemption is unavailable for *all* employees in the category. As described in the petition for certiorari, at 16, in Takacs, pursuant to DOL's current restrictive interpretation, a deduction from the pay of each of seven employees, out of over four hundred employees in the category, is not correctable and causes unavailability of the exemption. Thus, under DOL's current interpretation, approximately four hundred employees who experienced no deductions whatsoever, and who constitute approximately 98% of the employees, also lose the exemption. DOL's 1986 and current interpretations and the effects of these interpretations are simply not consistent.

A July 17, 1987 DOL opinion letter is even more clearly inconsistent with DOL's present interpretation. In the 1987 opinion letter, DOL advised an employer that it could dock the salary of exempt employees[2] during approximately seven different weeks over a two-year period, when the employees attended collective bargaining negotiations. DOL stated that the employees would be

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[2] The number of affected employees is not stated in the opinion letter, but the affected employees are referred to in the plural.

treated as non-exempt during the seven weeks in which their salaries were docked, but that this would not affect these employees' exempt status in other weeks when the employees are paid on a salary basis. United States Department of Labor, Wage and Hour Opinion Letter (July 17, 1987), 1987 WL 467862.

Thus, as of July 1987, DOL took the position that the docking of each of apparently several employees' pay, seven times over a two-year period, were "occasional" deductions that do not rise to the level of "regular and recurring" deductions. Although these were neither one-time nor inadvertent deductions, the employees did not lose the exemption (except for the weeks in which they were actually docked pay). Again, this is simply inconsistent with DOL's present interpretation, and leads to inconsistent results. Under DOL's present interpretation, not only the employees who attended the negotiations and were docked pay, but all other employees in their category, would lose the exemption, for at least the entire two-year period over which docking occurred. By contrast, pursuant to the July 1987 opinion letter, the exemption would have been preserved for the employees in Takacs.

Thus, DOL has recently interpreted the window of correction provision, and the preservation of the exemption, far more narrowly and restrictively than it did in earlier opinions. As seen in its amicus briefs in Klem and Auer, in which these prior opinion letters are not mentioned, DOL has not tried to explain nor has it even acknowledged this change in its position. Further, DOL has narrowed its interpretation despite unprecedented confusion and conflicting decisions concerning the standards for compliance with the salary basis test in recent years. Under these circumstances, DOL's recent restrictive interpretation is not only inappropriate, it is also likely to lead to massive liability for employers and windfall awards for highly-paid employees.

In summary, DOL's recent interpretation should not be given deference because it is not consistent with the plain language of the window of correction provision nor with the Court's reading of the provision in Auer, it is not based on an ambiguous regulation, and it is not consistent with DOL's prior interpretations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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